MICHIGAN SUPREME COURT

PUBLIC HEARING
MARCH 30, 2011

CHIEF JUSTICE YOUNG: Welcome to the March Public Hearing on the pending court rules. I'd like to acknowledge our new Supreme Court Administrator, Judge Chad Schmucker. This is his first public hearing; he just started Monday. And we're trying to bury him. With that we have one, two, three, four - five items for which there are speakers. The first of which is Item 1 which concerns the proposed amendment of Rule 8.126 of the court rules. And we have to speak on that two speakers - Mr. Rombach. Good morning.

ITEM 1: - 2004-08 - MCR 8.126

MR. ROMBACH: Good morning. May it please the Court. I am Tom Rombach, Treasurer of the State Bar of Michigan. I'm here to support proposed amendments to MCR 8.126 - the pro hac vice rule. The State Bar supports the amendments proposed by the Attorney Grievance Commission. These amendments accomplish three important goals. First, they clarify that MCR 8.126 applies to arbitrations that take place in Michigan rising out of Michigan cases and controversies. This is consistent with the recently revised MRPC 5.5 addressing unauthorized practice of law in multi-jurisdictional practice. Second, the amendments prevent motions from being filed without payment of the required discipline and client protection fees. And third, the amendments require payments and the fees for the pro hac vice motion for each time one comes into the state to practice. The State Bar proposed additional amendments to address four other issues that arise when implementing MCR 8.126 in partnership with the Attorney Grievance Commission. First, our amendments reference arbitration proceedings consistently throughout the rule. Second, our amendments require that out-of-state lawyers to submit a certificate of good standing for the jurisdiction in which he is eligible to practice so as to further protect the public. Third, our amendments clarify that the phrase out-of-state attorney excludes State Bar members who are licensed to practice elsewhere. This is a very important protection otherwise State Bar members who are otherwise ineligible to practice in our state can do an end-run and then get credentialed out-of-state and then come back and practice here. Fourth, our amendment specify the State Bar will acknowledge

payment of the required fees within three business days. The pro hac vice rule is in place to protect the public. This is also the principal mission of the State Bar of Michigan. To promote that purpose I urge the Court to adopt amendments to MCR 8.126 as proposed by the State Bar. Thank you.

CHIEF JUSTICE YOUNG: I have a question for you. Do you support the idea that the fees for entry as a pro hac vice lawyer should be annual?

MR. ROMBACH: Your honor, my hearing isn't so hot, if you could speak up a little bit.

CHIEF JUSTICE YOUNG: Yeah, well I'll try. Do you support the proposed - there was proposal that pro hac vice lawyers should pay the fee annually. Do you support that?

MR. ROMBACH: Our current - I know that goes to Mr. Andree's comment that right now the practice has been, and we're in concurrence with the Attorney Grievance Commission, that the - the fee should be paid once per case, not once per annum as Mr. Andree has suggested. Again, you're the final arbiters of what the rule should be and I leave it up to your jurisprudence.

CHIEF JUSTICE YOUNG: All right.

MR. ROMBACH: But that's how we currently do it now, your honor.

CHIEF JUSTICE YOUNG: Well, how does that parallel to the obligation of the members of the State Bar of Michigan who pay an annual fee?

MR. ROMBACH: How does that -

CHIEF JUSTICE YOUNG: Yeah. I'm just trying to figure out what the -

MR. ROMBACH: How does it work?

CHIEF JUSTICE YOUNG: we're being consistent - whether we're - we're favoring one or disfavoring another depending on whether you're actually licensed in the state versus a guest of the state.

MR. ROMBACH: From a practical standpoint, it works - in arbitration is that what you're asking about?

CHIEF JUSTICE YOUNG: No, no, no.

MR. ROMBACH: Just generally?

CHIEF JUSTICE YOUNG: I'm asking the question that - we want the lawyers who are coming as guests, in effect, to pay no less than the lawyers who are licensed members of the State Bar of Michigan. My question is is an - a per case fee equitable given that annually we require State Bar of Michigan lawyers to pay their fees every year.

MR. ROMBACH: The per case fee right now is to acknowledge that they're subject to the grievance proceedings and disciplinary proceedings in the state of Michigan as well as that they should be contributing to the client protection fund as each and every lawyer does. I understand -

CHIEF JUSTICE YOUNG: Yes, but our lawyers do that every year.

MR. ROMBACH: We have to do that annually, and all of us -

CHIEF JUSTICE YOUNG: All right. My question is why do we - why do we not require that of those who are here by sufferance as pro hac vice lawyers?

MR. ROMBACH: I think that would be certainly up to the Court to make that requirement, right now it's not currently required. That is not the practice -

CHIEF JUSTICE YOUNG: Well, I understand, that's why I'm asking. Do you have an - if you have no opinion on the question, that's fine. If you do have an opinion, I'd - I'd like to know.

MR. ROMBACH: Your honor, I can certainly see why it would be fair if you have a case going on for a longer duration than a year - of course, that would build in some - some practical problems. For instance, if you were to come in and start an arbitration in December and then finish that arbitration the following January, then under a rule as constructed per annum, or during our Bar year for instance, then you would be paying two fees for a case that only actually went two months. So - so that's the (inaudible).

CHIEF JUSTICE YOUNG: So when you come in - when you come in as a new lawyer in December, or whenever the end of the Bar dues year is, you would - you would not have to pay a new fee for the new Bar year.

MR. ROMBACH: Right now you only have to pay one fee for one case.

CHIEF JUSTICE YOUNG: I'm talking about lawyers who are licensed. How often do you have to pay the fee?

MR. ROMBACH: How often do I pay dues?

CHIEF JUSTICE YOUNG: Yeah.

MR. ROMBACH: I pay dues at the beginning of the Bar year which would be every September, yes.

JUSTICE HATHAWAY: Well, isn't that comparing apples with oranges. I mean you've got an attorney coming in from out-of-state who wants to handle a case here in Michigan, that's not on a yearly basis. Whereas, we're paying annually on a yearly basis, they're paying by the case. They may have a case one year, but no case the next year. Isn't that correct?

MR. ROMBACH: That's correct.

JUSTICE HATHAWAY: So, I don't understand how you could have them pay a yearly fee or an annual fee.

MR. ROMBACH: Again, if they're to pay annually, then that would certainly be consistent with - with the rule as stated now. I'm just trying to convey to the Court what the practice has been when somebody calls up the Attorney Grievance Commission or contacts the State Bar we're - we're interpreting that rule currently as saying that it's - it's per case. But, certainly, if the Court wants to make the requirement that it should be per annum, then that would certainly be fair. I can understand you know the point being made here, and we'd certainly be willing to enforce that requirement as well. Again, that's why it's up to the Court to determine finally what the court rule should be.

JUSTICE MARILYN KELLY: Well, do you think it makes sense if somebody is involved in complex litigation that extends over a year and obtains permission to represent a party pro hac vice that they should have to come back in the course of that

litigation because the year expires and seek a second permission?

MR. ROMBACH: I think it makes infinite sense if the Court wants to make that requirement for -

JUSTICE MARILYN KELLY: Well, we know we can do it if we want to do it. Our question of you is what is the - what are the pros and cons of our - of our changing the rule?

MR. ROMBACH: The pro on its face certainly is - as has been suggested by the questioning - the pro would be the sense of fundamental fairness that the out-of-state attorneys are paying the same freight as an in-state practitioner would under the same circumstances. The con would perhaps be that how the structure and how the dues would be paid simply because we invoice our lawyers in advance of the Bar year and then they pay during the course of a certain period of time. This rule kind of makes that structure much easier for us because as our proposal has indicated, that we'd like them to pay that money up front before they're capable of bringing a motion to that tribunal and asking for admission to the Bar. So that would undercut some of the - if we are given this amendment that we're proposing would undercut some of the practical logistical problems. So certainly the Court could require a per annum for cases that are complex and do lead over a longer duration of time. We'd certainly be willing to enforce that rule and I see that that rule would be fundamentally fair. I just don't want to suggest to the Court that that's the practice as it currently is because we don't see any language in the rule that requires it now. But if the Court were to add that language then, certainly, we'd be more than willing to enforce it. And, again, the fundamental fairness may - may lead the Court to believe that should be a requirement and we'd certainly support that.

JUSTICE MARY BETH KELLY: Just so that I understand your position. Your position is that fundamental fairness would require that those lawyers admitted pro hac vice actually pay an annual fee if their complex cases last longer than one year - if the duration of the case lasts longer. The only con you see - the only negative issue you see is that of invoicing because you invoice up front, so to speak, for pro hac vice admission, and that some practical arrangement would have to be made for a lawyer whose case lasts longer than one year duration. That's the only negative issue you see for those lawyers whose pro hac vice admission results in a case of a complex duration for longer than one year. Is that correct?

MR. ROMBACH: Correct. On the other hand, that the amendments as we're proposing would - would facilitate not having the problem as you've identified Justice because we would be able to get the - the applicant - the pro hac vice out-of-state lawyer to pay that fee up front before they come to the tribunal asking for permission to practice.

JUSTICE MARY BETH KELLY: Okay, but -

MR. ROMBACH: Therefore, it's not our invoicing practice.

JUSTICE MARY BETH KELLY: Again, but - if fundamental fairness would require that those lawyers who are guesting in our state so to speak be treated equally, those lawyers whose cases last longer than one year could submit fees for the second year voluntarily if they know that their case has passed their one year anniversary so to speak, right?

MR. ROMBACH: Again, you struck upon a concern that whether we're - right now we're kind of based on the honor system. They make a representation - an affidavit - we, as the State Bar, would like that verified. For instance, their affidavit does not require right now that they be in good standing other than a representation of good standing, we want to trust but verify the fact that they are in good standing. So the same thing if that case were to last longer there's no mechanism built in that - aside from being on the honor system that they pay in we wouldn't have to - another trigger - it wouldn't be a separate motion to say I'd like to stay an additional year. Right now that's the practical element that we're only collecting it once because we only see them once. They come in with a sponsor from an in-state lawyer, they say hey, we'd like this out-of-state practitioner to be able to serve in a limited role here in the state of Michigan and we collect the fee up front and then it's filed - forget - we don't see it again. So you are right that it would be somehow - and, unfortunately, that burden may fall to the Attorney Grievance Commission and that's one of the reasons we've asked for the additional amendments to be put in place so that would relieve some of burden of the verification process from the AGC because right now it's on their shoulders and whether they can execute that as we've all suffered cutbacks and more limited resources that's why we'd rather have it built into the rules.

CHIEF JUSTICE YOUNG: That's why you'd rather not collect the second fee.

MR. ROMBACH: I'm sorry?

CHIEF JUSTICE YOUNG: That's why you'd rather not collect the second fee then because we don't want and don't need the additional money. Any other questions?

JUSTICE MARKMAN: Well, what you're basically saying is that the con of distinguishing between simple and complex cases is that that process requires additional complexity and monitoring. Isn't that the argument against it?

MR. ROMBACH: Your honor, I'm having trouble hearing you. I'm sorry, your voice isn't carrying as well as others.

JUSTICE MARKMAN: I had interpreted you as saying, perhaps incorrectly, but I had interpreted you as saying that one of the concerns about distinguishing between simple and complex cases for pro hac vice purposes is that that would impose a greater complexity and monitoring obligation upon the process.

CHIEF JUSTICE YOUNG: It's harder to verify - it's a more complex process if you have to pay after the initial payment.

MR. ROMBACH: Yes, it is. And, again, we have it built in the rule in anticipation of your concerns how we're to collect that second year going on. But, again, we'd certainly be willing to do that and we - I understand the fundamental fairness of having the discipline and the client protection fees because we do require that of our own practitioners on an annual basis.

CHIEF JUSTICE YOUNG: Thank you. The next speaker is Terrance Bacon.

MR. ROMBACH: Thank you very much.

CHIEF JUSTICE YOUNG: Thank you. Good morning.

MR. BACON: Good morning. May it please the Court. Although I'm a retired practitioner, I still pay attention from time to time to these rules. And I was coming down here really for one of the - or one or two of the other rules, but as long as I was coming I thought I would give a couple comments on this one understanding that if there - I have no skin in this rule. It's going to be applying to out-of-state lawyers for coming into here.

CHIEF JUSTICE YOUNG: You do as a member of the Bar, however, and a concern for protecting the public.

MR. BACON: Well, I think it's - it's significant that the speaker here I think is the treasurer of the State Bar, this is really a revenue enhancement rule here. Initially, a revenue probably maybe equalizing rule because of - when put in the format of the pro hac vice for court proceedings that you get a lot of - there may be complaints and other (inaudible). I'm really focusing today on the arbitration aspect of this. That I think the Court is creeping, but has not you know maybe a little the cart before the horse on this one. These kinds of rules are found in some other states dealing with arbitration, and similar to what was in 5.5 they were really presented as safe harbor rules for out-of-state lawyers to be able to come into a state and be able to do arbitrations without the threat of claims of unauthorized practice of law going back to the *Berbower* in California. And after that they started a safe harbor, but most states then turned them into revenue generating procedures. I think that - that there's a fundamental point here that you have to decide is representing somebody in an arbitration really the practice of law - and in all arbitrations. Otherwise, why are you imposing these conditions on an Indiana lawyer, but not a Michigan accountant, banker, electrician, contractor that may very well engage in arbitrations with no lawyers involved. Arbitrators don't have to be lawyers, there's no precedent in Michigan establishing that you have to be a lawyer to represent somebody in an arbitration. That part is - is my main concern is that you be thinking about that and the fact that -

CHIEF JUSTICE YOUNG: Can I ask you a question?

MR. BACON: Yes.

CHIEF JUSTICE YOUNG: If you're - you're quite right, I'm aware of no rule or law that requires you to be a lawyer to engage in arbitration. But I simply put to you the question when a lawyer does engage in representation, is he or she subject to the ethical canons of professionalism in doing so?

MR. BACON: Well, a lawyer is subject to those ethical canons whether or not he's practicing law in particular situations.

CHIEF JUSTICE YOUNG: Correct. So when you - when you are - so why do we make a distinction between a Michigan lawyer and an Indiana lawyer doing the same activity?

MR. BACON: You don't for purposes of complying with the rules of professional conduct for that lawyer. The issue is whether you -

CHIEF JUSTICE YOUNG: Well, but really you - I want to challenge another premise you - you began with that this is a revenue generating rule. I want to challenge that on the basis of the fact that this is a way of extracting the cost of doing business as a lawyer in the state for the protection of the public because it drives the client protection fund and so on. So I guess I'm trying to figure out your - what your premise is when - when if as a Michigan lawyer I'm engaging in arbitration and violate the canons doing so that - that somehow that is different from being an Indiana lawyer doing the same thing.

MR. BACON: I think there can be a legitimacy to that concern. To my knowledge -

CHIEF JUSTICE YOUNG: Thank you.

MR. BACON: Well, it's one that I would think of too, but the - the point is and I asked and it was only very preliminary and there may be a different answer, do we have any history in Michigan of problems, of complaints, grievances, against out-of-state lawyers in Michigan doing arbitrations.

CHIEF JUSTICE YOUNG: We - we didn't have -

MR. BACON: I'm not aware of any.

CHIEF JUSTICE YOUNG: We didn't have - when we began this process, we weren't - there was no process for pro hac vice in Michigan. And - and what we found out actually is there are a lot more than we ever anticipated.

MR. BACON: I'm - all I'm saying is I'm not aware that there's any foundation for the concern dealing with arbitration. I would agree in some of these complex arbitrations my reaction is that is the practice of law - it involves everything that you need to do. But arbitration started as a way to be - avoid some of the red tape of court proceedings, and to be able to do things more informally. The result of this rule is if you had an out-of-state lawyer, you will now be requiring that a - a

party have two lawyers in his arbitration when he comes in. That you are imposing - let me back up. I think the state's proposal is an advancement over the Supreme Court's initial proposal to make sure that you take - make the reference to arbitration in all of the appropriate places. But arbitrators have no particular expertise and, in fact, generally speaking no authority for deciding who appears in front of them in an arbitration. And yet you're now placing - or purporting to place on an arbitrator who may not be a lawyer at all the duty to exercise a discretion as to whether to admit somebody pro hac. And that's enough of my three minutes.

CHIEF JUSTICE YOUNG: All right. Any questions? Thank you very much. The next item for which there are speakers is Item 3 - proposed amendments to subchapter 9.100. These are the rules pertaining to attorney grievances and such. And the speakers for this are first and foremost Robert Agacinski.

ITEM 3: - 2006-38 - MCR 9.100 et seq.

MR. AGACINSKI: Good morning your honors. I'm Robert Agacinski the Grievance Administrator. And I would like to spend my three minutes of fame focusing on my obsession with Rule 9.128 which I did write to the Court about as well. It is our position that the clarification that we are proposing simply is a restatement or a clarification of the rule as it presently stands. And I really have two positions that I want to make during this three minutes. Number one, hearing panelists and board members do not and cannot have the power to sanction litigators in a proceeding. They are an administrative body, they do not have contempt power, they cannot sanction those who are advocating in a proceeding. And the second position is that it is bad policy for them to think they can. Earlier this month I was having lunch with my oldest and dearest friend, David Brusch (phonetic) and our wives, and Dave was just appointed as immigration judge by - which is an appointment by the Attorney General of the United States - that's how he got the position. And I asked him, can you assess costs if litigation is frivolous and he said no. He can't - he doesn't have that power to assess costs against parties for frivolous litigation. So what if lawyers insult you in a proceeding, can you sanction them? He said no. All he can do is refer them to the disciplinary body within the court or to us for the behavior that occurs in front of him. Immigration judges can't sanction litigation people. Administrative law judges can't sanction. Arbitrators and mediators can't sanction. District court magistrates can't sanction. And I bring this out because everybody's always met

my argument initially with derision that, of course, judges can sanction those who are performing in front of them. Not in administrative hearings. In the kind of administrative hearing that we are involved with the hearing panel and board members have limited jurisdiction over the license of the attorney who's before them on a due process hearing.

CHIEF JUSTICE YOUNG: I'm sorry, I didn't hear the number. I'm trying to locate the rule that you're -

MR. AGACINSKI: Rule 9.128.

CHIEF JUSTICE YOUNG: 128. Okay, thank you.

MR. AGACINSKI: And that is the sole jurisdiction of the hearing panel and the board - touching upon the license. Everything else is a threat against the license that we impose - any other remedy about reinstitution and all that cannot be enforced other than by touching the license. But the litigators are before them as advocates do not have their license on the line, and as a result the hearing panel has no ability to touch those individuals. Now why do I think it's a bad policy? Well, in the last case cited in the writing by Mr. Danhof to this body, he talked about the *Doyle O'Connor* case in which the hearing panel evaluated whether or not to sanction the Commission and me for a charging decision. And by a 2 to 1 decision they decided well we can't really sanction to this case, but we can sanction, and the dissent, Miles Hurwitz, who's been around longer than me says yes we can and we should have sanctioned the Commission and the Grievance Administrator. Three appointees of Mr. Van Bolt deciding whether or not they should sanction the nine appointees of this Court on a charging decision. We are sister agencies and it is my feeling that this kind of imbalance of power where one sister can now sanction the other for doing its job in the way that the one sister thinks is inappropriate can lead to sanctions. 9.131 has the remedy if you think the Commission or its employees were acting badly. And, frankly, this Court is our boss. A phone call to you about my behavior or commissioners' behavior can get the same remedy done. But it should not be done in a hearing by a hearing panel or reviewed by the Commission. It is bad policy and it is - it is not the law. Thank you.

CHIEF JUSTICE YOUNG: Thank you. Cynthia Bullington.

MS. BULLINGTON: Good morning.

CHIEF JUSTICE YOUNG: Good morning.

MS. BULLINGTON: I'm here to specifically address two of the rules that have perhaps come under most challenge. 9.104 - The State Bar of Michigan has proposed the removal of provisions 9.104(A)(1) - (5). The Commission believes that that would work a substantial harm to the ability of the Attorney Grievance Commission to appropriately prosecute attorney misconduct. In particular, there are certain types of cases that do not fall readily into the strictures of the Michigan Rules of Professional Conduct. So, for example, a situation involving what was tantamount to judge shopping by a lawyer who managed to have a particular judge disqualified on a continual basis because he was a blood relative. In that situation, the court was able to use the 9.104(A) provisions and to find that the attorney had - had engaged in misconduct.

CHIEF JUSTICE YOUNG: Can you explain that again?

MS. BULLINGTON: Yes. There is a situation that had cropped up down in Monroe, Michigan where there was a sentencing judge that was considered less favorable than another judge. And that less favorable judge had a relative - a blood relative - and law firms would go out of their way to hire that blood relative -

CHIEF JUSTICE YOUNG: Okay, I understand now.

MS. BULLINGTON: And the court ultimately determined that that conduct was wrong although that conduct itself had been dismissed earlier by the Attorney Discipline Board because it did not fall squarely within the rules set forth under the Michigan Rules of Professional Conduct. And there are points raised in some of the commentary filed concerning these - these aspects of the rule saying that all rules should be kept in one place so that attorneys have knowledge of it. All these rules that we charge - the Michigan Rules of Professional Conduct and the court rule violations are orders of this Court. They are created by this Court, they are put into place by this Court. Lawyers are charged with knowledge of the court rules, they're charged with knowledge of the Michigan Rules of Professional Conduct. We include charges in formal complaints of violations of civil discovery rule. We include in there violations of the Michigan Rules of Professional Conduct. We've listed criminal code charges. So trying to argue that all violations should simply be in the Michigan Rules of Professional Conduct ignores the very real violations that are charged.

Now I want to move quickly onto 9.115 with respect to the discovery rule proposed by the State Bar of Michigan. The proposal is unworkable, it's invasive, and it simply is a - to be blunt a bad idea. It would create more problems than it would purport to solve. Right now lawyers can obtain copies of any item that my office intends to offer into evidence. We have acknowledged a duty to provide information of an exculpatory nature. What we do not provide is notes of witness interviews that our staff investigators or our attorneys have conducted. We also do not provide confidential memorandum analyzing cases to the Commission. All of this type of information would become the subject of many discovery battles should the State Bar rule be adopted under 9.115. And that type of continual collateral discovery battles would work harm to trying to fit - to trying to complete a disciplinary proceeding within the 90-day guideline. Now keep in mind, disciplinary proceedings essentially are a continual reexamination of the character and fitness of attorneys. And an expedited procedure helps not only the public and the profession and the courts, but the respondent-attorney himself or herself. Having these matters pend for years and years does not help anyone, and that's exactly what would happen when you start adding in depositions, when you start adding in requests for admissions, when you start adding in interlocutory questions, you are building into the system delay, you're building in costs, you're building in everything that works against a prompt and fair resolution of disciplinary charges.

CHIEF JUSTICE YOUNG: Questions? I have one. It has to do with 9.104(B) - what you call the - characterize as the habitual offender rule.

MS. BULLINGTON: Yes, sir.

CHIEF JUSTICE YOUNG: I have a couple different concerns. One, you've insisted that you will continue to have the right to issue what you characterize as nondisciplinary notices. I don't know what your authority to do that is, but I lost that battle. And yet, here you propose to be able to use acts which are - have not been adjudicated as disciplinary by - by including what you characterize as multiple acts or omissions. It strikes me as extraordinarily broad - I don't even know what acts or omissions are liable to be brought into bear here - and it isn't even misconduct that you're saying - prior acts of misconduct.

MS. BULLINGTON: That rule had gone through several incarnations and the initial proposed - or the initial draft basically had limited it to charging prior findings of misconduct into a formal complaint, and that still basically is the contemplated manner of doing so.

CHIEF JUSTICE YOUNG: That's not - I'm looking at the final product, it says -

MS. BULLINGTON: It - yes, sir.

CHIEF JUSTICE YOUNG: multiple acts and omissions. It doesn't say multiple acts of misconduct. Even in the case that you mentioned, *Monroe*, where there's a judicial finding of misconduct that seems to be perfectly permissible as a charge of abuse of the administration of justice. So I - I don't understand why you're - you're concerned that you can't get at these activities that - that are violations in someway of either the canons or the court rule.

MS. BULLINGTON: The rule was broadened to its final form to enable our office to also list those dispositions where private admonishments were issued by our office. Our office has the ability to, with the respondents agreement, issue an admonishment and an admonishment is not discipline. And -

CHIEF JUSTICE YOUNG: That's right. So - then it's - that's - if you choose not to discipline, why can you then use that in a subsequent proceeding?

MS. BULLINGTON: Because then that would show the pattern of conduct engaged in by the attorney. For example, we have a -

CHIEF JUSTICE YOUNG: A pattern of non - nondisciplinary conduct.

MS. BULLINGTON: Well, it's a pattern of conduct of let's say, for example, neglect or ineffective representation - incompetent representation. So, for example, we have an attorney currently who has had - and I believe that the number is ten admonishments, three public reprimands, and we are about to file another complaint against this particular attorney. Now, again, these are fairly low level types of misconduct cases and the hearing panel -

CHIEF JUSTICE YOUNG: But where you have multiple actual disciplinary activity and it forms a pattern, I don't see why

you're having - you have any difficulty and you can certainly bring into bear the un - the nondisciplinary warnings you've issued in the penalty phase, right?

MS. BULLINGTON: And that's only where it goes into the penalty phase. Here, you have a situation -

CHIEF JUSTICE YOUNG: Well, maybe that should weigh in your - your contemplation when you decide to admonish rather than to discipline.

MS. BULLINGTON: I'm - I didn't catch that last question.

CHIEF JUSTICE YOUNG: I'm concerned that you've insisted on issuing nondiscipline which you would like to now use in - in weighing in on a discipline - a subsequent disciplinary matter. It seems to me you made a choice earlier that this is not worthy of discipline and why aren't you held to that decision?

MS. BULLINGTON: Again, a lot of these types of cases involve situations where let's say the individual who is complaining is an incarcerated individual and maybe accorded less credibility, there may be a shortened period of neglect by the attorney, it may be something that the attorney failed to adequately prepare in a particular instance, but it's an incompetent neglectful representation by the attorneys that panels typically - they might not find - they would typically not find discipline in a certain type of situation. It's over the course of years that you see this attorney come back again, again, and again, and they accumulate all this - these admonishments, they accuse - accumulate all these reprimands, but it's in these very minimal type of cases. But overall, the - there is a problem with this particular attorney, and the panels should be able to know all of this pattern of conduct engaged in by this attorney so that they can assess is this attorney appropriately and competently representing the public.

JUSTICE HATHAWAY: Could you change the words omissions - acts and - prior acts and omissions to prior formal admonishments to include what you're trying to do?

MS. BULLINGTON: You certainly could. You could list out admonishments, you could list out prior discipline, and I -

JUSTICE HATHAWAY: Which would be narrower than prior acts and omissions.

MS. BULLINGTON: Absolutely.

JUSTICE MARY BETH KELLY: But - but, again, it goes to the nature of an admonishment. If an admonishment is not a finding of misconduct, you're really changing it into a finding of misconduct. And why would the Commission - why would the Commission issue - issue admonishment, after admonishment, after admonishment for a given lawyer. Why would not the Commission come to the belief that after a certain number of admonishments this lawyer is not worthy of an admonishment again? Why is that not fault on the part of the Commission? And I'm not understanding how - how we can change the nature of an admonishment.

MS. BULLINGTON: You know -

JUSTICE MARY BETH KELLY: If it is in the nature of an admonishment that it is not a finding of misconduct, aren't you changing the very nature of an admonishment here?

MS. BULLINGTON: An admonishment is a disposition that is of record. Keep in mind that while the Commission issues an admonishment an attorney may refuse to be admonished, and in such instance then the Commission must either close the file or proceed to file a formal complaint. Admonishments stay in place only with the attorney's agreement. And -

CHIEF JUSTICE YOUNG: But you have - you have characterized this as nonsanction, it's not a discipline.

MS. BULLINGTON: It is not a discipline.

CHIEF JUSTICE YOUNG: Well, I don't even think you have the authority to do it as I've suggested, but you've insisted on it and now you want to - it's a - it's a - in effect an acquittal by agreement and now you want to take the acquittal and say well he's got a lot of these acquittals he must be a bad guy. I mean I think Justice Kelly has - has put her finger on it. You're trying to use something - you have - if you have a pattern of admonishments against a particular attorney, that's your problem. You haven't chosen to step up and say this attorney is neglectful and he should be sanctioned. Why - why do you get to - why do you get to string him along and say - give him all these sanctions - these nonsanctions and then turn them into a sanctionable event?

MS. BULLINGTON: And in that same situation, this same attorney has also had three reprimands.

CHIEF JUSTICE YOUNG: Well, you've got three reprimands, okay. That's - that's discipline.

JUSTICE HATHAWAY: Is it because you consider each admonishment separately and attorney A gets an admonishment for the same event so attorney B gets an admonishment for the same event and you don't consider the extraneous things; therefore, you have to have an admonishment.

MS. BULLINGTON: Yes and no. And you look at - we have a general policy - and I emphasize the general nature of it - where if it's - an attorney has had three admonishments over the course of the year we give strong consideration that the next file should be a - a formal complaint. And there may be some factors you know mitigating against the filing of a formal complaint depending on the strength of the case, depending on a myriad of factors. And in this - again, taking this one individual's case - you may have had three admonishments, four admonishments, and then we had a filing. Then you may have had more admonishments and you had another filing. And then you had more admonishments and you had another filing. So it depends upon, again, the myriad of factors the length of the attorney's practice, the type of -

CHIEF JUSTICE YOUNG: But it's your decision - it's your decision whether to escalate to discipline or continue to admonish even for the same kinds of conduct. That being the case, I don't see why - how you can then transform it into a disciplinary matter when you yourself as prosecuting - the prosecutor in this process, haven't made the determination previously to escalate to a charge.

MS. BULLINGTON: The proposal is to give information to a panel looking at the attorney's fitness to practice law. And when you go into the case these panels do not know the past history of the attorney when they're looking at the charges. It's only when misconduct has been found then the information is then introduced at the sanction portion of the proceedings.

CHIEF JUSTICE YOUNG: Can this come in as 404(b)?

MS. BULLINGTON: Typically, that rule has not been used to its fullest extent and I think that -

CHIEF JUSTICE YOUNG: Whose fault is that?

MS. BULLINGTON: you certainly - and that would be our fault.

CHIEF JUSTICE YOUNG: Why isn't that the most sufficient way of dealing with - if you can establish sufficient similarity, why can't you just introduce it as - on that basis.

MS. BULLINGTON: You can certainly do that where there is room to meet the 404 -

CHIEF JUSTICE YOUNG: Right.

MS. BULLINGTON: rule (b), but attorneys are admonished for a variety of things. You can - you could be admonished for failing to file a late answer, you could be admonished for a drunk driving offense, you could be admonished for neglect. There is a whole panoply where the several admonishments might not necessarily meet the 404(b) pattern so you could bring them all in.

JUSTICE MARKMAN: Ms. Bullington can you help me understand what exactly an admonishment is. I mean we've seen these for years, but is it as Justice Young characterized - Chief Justice Young characterized is it essentially an acquittal or is it more in the nature of a police officer given you a warning. This time I'm not gonna give you a ticket, but next time it might be different. In other words, is there such a thing as admonishable conduct in some objective sense or does it always depend on what yesterday? Is there such a thing that can be characterized objectively as admonishable conduct or is it always a function of whether or not the individual under consideration has committed admonishable conduct yesterday and the day before. And if they have, is it transformed into something more than admonishable conduct.

MS. BULLINGTON: I like your analogy that you came up with regard to the police officer. When the Commission issues an admonishment, it only does so after the Commission concludes that the attorney has engaged in misconduct that violates the rules. You know if there's a practice by the attorney that the Commission does not think is good practice for a lawyer, it will close the file, may include it in their general language saying well think about this situation.

CHIEF JUSTICE YOUNG: Just a minute. What you've said is very interesting. If you give an admonishment when you believe there's been a violation, yet you don't issue discipline, right, that is more like what Justice Markman says - it's a warning.

MS. BULLINGTON: That's right.

CHIEF JUSTICE YOUNG: So every time I'm speeding and the - and a cop gives me a warning rather than a ticket, guess what, I don't have a speeding ticket. I don't have the points.

MS. BULLINGTON: You have the points on file -

CHIEF JUSTICE YOUNG: No -

MS. BULLINGTON: with our office though, and that's -

CHIEF JUSTICE YOUNG: No, it's a warning.

MS. BULLINGTON: perhaps where the analogy fails because the admonishment is kept forever. And under 9.115(J) of the court rules, when you do get to the sanction phase a panel must take into account admonishments as aggravating factors. This Court in the case of *Lopatin* has also instructed that we use the ABA standards. Under the ABA standards, 9.22 of the ABA standards, that would also come in as an aggravating factor. So it does have an affect; it's something more than a warning that's never recorded. It is recorded, it's kept, and it's used.

JUSTICE MARKMAN: Is there anything that can be an admonishment on the eleventh time that it occurs? I've done a very - I've committed a very trivial offense and we're gonna admonish you for it. You've gone over the speed limit by half a mile per hour and we're not gonna sanction you this time, but is there anything that is admonishable on a ninth, tenth, eleventh time that it's been repeated? Or under those circumstances is it always a matter of looking to the aggregate conduct and saying by considering these past nine or ten events, we now think that what used to be an admonishable offense is something more.

MS. BULLINGTON: I think the best response to that is probably a situation where - again, this Court requires in its court rules 9.113 that an attorney file an answer to a request for investigation within set time limits. Failure to file an answer within those time limits is misconduct - pretty much per

se. And that type of example would probably fit your question the best where let's say an attorney is a few days over the final time limits for answering it, yeah, but that would be -

CHIEF JUSTICE YOUNG: Seven times.

MS. BULLINGTON: Seven? I'm sorry?

CHIEF JUSTICE YOUNG: Seven times.

MS. BULLINGTON: Seven times, yes. And looking at that situation, the Commission would likely have a real tough decision to make is do we admonish you know this guy again because he's not getting the picture, or for someone who hasn't answered you know on time, but it's only late by seven days you know do we file a public proceeding where the attorney is likely to get public discipline. He'll have to - you know pay administrative fees, out-of-pocket costs, and you know have his name appear in the bar journal.

JUSTICE MARKMAN: But I think the key distinction, and it relates back to the Chief Justice's question, is an admonishment analogous to somebody going one mile under the speed limit and in every case there's no violation of the law, but the officer stops him and says you're coming pretty close to violating the law, or is an admonishment more like going one mile over the speed limit in which case at some point you look to the cumulative nature of what's taken place.

MS. BULLINGTON: In some instances, you look at the single incident, in some instances, you look at the cumulative (inaudible).

CHIEF JUSTICE YOUNG: I want to make sure that I understood what you said. You said that an admonishment was only issued after the Commission determined that there was a violation.

MS. BULLINGTON: Yes.

CHIEF JUSTICE YOUNG: So if this is not - you haven't made a violation, but there's something hinkey about what you're doing - there's a determination - there's a violation - but you choose not to escalate to discipline.

MS. BULLINGTON: Right. And that's where the admonishments come in. Now there's a lesser disposition which is not any type of discipline, not an admonishment, nothing -

CHIEF JUSTICE YOUNG: An admonishment is not discipline either.

MS. BULLINGTON: right - where we will close a file and - this would be like the one mile under - and, again, going towards like a best practices type of situation such as we would caution an attorney to keep in mind that you have to file you know they have to maintain an appropriate diary system in your office to ensure you know prompt filing of necessary pleadings. That would be the type of language we might use where there hasn't been a violation.

CHIEF JUSTICE YOUNG: Thank you.

MS. BULLINGTON: Thank you.

CHIEF JUSTICE YOUNG: Mr. Bacon.

MR. BACON: Good morning, again. With respect to this proposal, I was focusing only on the catch-all - what I've referred to over the years as a catch-all provisions for discipline as a hearing panelist for quite awhile. Those generally get alleged in every complaint, and many times you'll see the orders by a discipline panel that include all those catch-alls all - every time. I think there is a need for the catch-all, whether it be interference with administration of justice or I think as was proposed by the ADB and it shows up in a footnote in the - the common presentation to you, some other statement of it. Some of the other ones in currently 9.104 are, frankly, a little hard to understand. I don't know that I ever used the word obloquy in my common parlance.

CHIEF JUSTICE YOUNG: Really?

MR. BACON: No, it just doesn't. Now maybe other people use that with respect to me.

CHIEF JUSTICE YOUNG: You might see it up here today.

MR. BACON: But I - so I think there needs to be some. I am one of those - and I would commend to you Mr. Dunn's comments I think were - I would join in those - I do think there is a value in having all of the standards in the Rules of Professional Conduct. People do look at what they're doing in trying to find out what's the rule that governs this even if it's a catch-all rule. And they can be consolidated and placed

there. I do have one suggestion in addition though that the catch-alls should not be used to impose discipline on someone who almost violated another rule - whether it be a conflict rule or something else - where you said well we're making a charge against him and we include the other ones because we really can't prove that there was a conflict that was violated or we really can't prove that there was an improper communication. I think those are not the ones that are appropriate for the catch-all. The catch-all are for the ones because you cannot have a listing of all possible violations unless you want to have something look like the tax code for - for lawyers to govern them. But they ought not to be the fallback where there's a specific rule that governs the nature of that conduct, the lawyer looks at the rule, complies with that rule, and then you say well, yeah, we couldn't get you by that rule but really didn't like what you did you know almost. If it's something that's not covered by the rule that is generally - this is something that we find very terrible - whether it's administration of justice by judge shopping or something else that you just can't have in the code, but those really ought to be used few and far between and not as a - simply a substitute for having the correct rule. Thank you.

CHIEF JUSTICE YOUNG: Thank you. Brian Einhorn.

MR. EINHORN: May it please the Court. I am -

CHIEF JUSTICE YOUNG: You have to - Excuse me, you have to get to the - so that we can hear you.

MR. EINHORN: Okay, thank you - speaking on behalf of the State Bar's position on the proposed rules. I want to say something quickly though about one of the things Ms. Bullington said about the discovery - There's no - and as the Court knows, there's nothing in there that requires depositions and interlocutories, and the (inaudible) not gonna fall down. All it requires is that the parties - both parties - provide nonprivileged information and evidence relevant to the charges against a respondent and other materials for good cause. So all it requires is that if the AGC has spoken with a witness who - it could be exculpatory, and they don't choose to use him as a witness and doesn't take a statement, they still have to provide that name. Something like 35 or 40 of the states do allow discovery, so this belief that discovery is going to ruin them is nonsense. The State Bar workgroup became involved at the request of this Court actually to take a look at rules that have been proposed by the - by the AGC and a panel was set up. One

of the questions they were asked I think once before is that this panel was respondent oriented which is not even close to true. I mean to - the people on the panel included Richard Cunningham who (inaudible) former judge and assistant AG presently and was on the - was a prosecutor for the AGC, Mary Dubin, who is a professor of professional responsibility at U of D and was the chairperson at one time of the Attorney Grievance Commission. Lynn Helland who's an assistant US attorney and is a hearing officer. John Van Bolt and Mark Armitage who you know are the Executive Director and Deputy Director of the Attorney Discipline Board, and including Mr. Agacinski and Ms. Bullington. We came up with all kinds of - mostly technical but improved changes to help the AGC do their job. And the only thing we wound up apart with are some of these absurd - and I can't think of a better word and I'm a lawyer I'm supposed to come up with a better word than absurd - but some of these absurd suggestions that they want and I - the only thing I can think about is that they lost a case once so they're trying to come up with a rule that will help them so they won't ever have to lose that case again. I mean the Court asked questions about this 9.104(B) which basically allows them to bring uncharged misconduct - things that may not even be misconduct, there's nothing in their proposal that even says what rule is violated. So why would there be an ability for them to bring uncharged conduct that has to do with somebody's ability to practice law without identifying what rule is violated. And so 9.104(B) is violative I think of due process, it's unconstitutional, it makes a violation of due process -

CHIEF JUSTICE YOUNG: Is 404(b) violative of due process?

MR. EINHORN: Your honor?

CHIEF JUSTICE YOUNG: Is 404(b) violative of due process?

MR. EINHORN: No, 404(b) is not violative of due process, but - but -

CHIEF JUSTICE YOUNG: Wouldn't that -

MR. EINHORN: the beginning - the beginning part of 404(b) limits the ability to bring in other type conduct until there's a charge. And - understand, and you were asking questions about admonishment, if my manner is admonished and I am subsequently charged with a violation of the Rule of Professional Conduct and the panel finds that I have violated that rule, once it comes down to sanction the fact that I was admonished ten times on my

parking ticket comes in - it is something that's considered. So this isn't something that they need within the rule - it will be considered in due time - but first there's got to be a finding that somebody did something wrong.

CHIEF JUSTICE YOUNG: My question is isn't the - the very concern that is raised in support of this rule to admit other acts and omissions covered by the rule of evidence 404(b)? If you've got sufficiently similar conduct, then it can come in then.

MR. EINHORN: If it's similar conduct and there's a way to get it in under 404(b) I mean exactly similar conduct, Brian Einhorn is charged with stealing money from a client and in the past I have also been charged with stealing money from a client, yeah, I mean it comes in - within the narrow focus of 404(b) it comes in. But they don't need a rule to (inaudible) what's in the rule of evidence. And -

CHIEF JUSTICE YOUNG: Precisely.

MR. EINHORN: Pardon me?

CHIEF JUSTICE YOUNG: Precisely.

MR. EINHORN: Precisely. And they also don't need a rule that doesn't identify what I mean when you take a look at the language it doesn't even identify what it is that they're talking about fitness to practice. What does that mean? I mean it doesn't talk about a violation of a rule, and that's what's so insidious about it. I want to talk about 9.112(E) which is another reach-out by the Attorney Grievance Commission to get things that - what they want to do, if the Court's familiar with it, I'm sure you are, is to have the right to demand somebody's physical or mental records. In other words, records from their doctors if there's a material - or genuine issue of material fact. So if they say Brian Einhorn we're investigating you, and there hasn't been a charge yet - this is just in the investigative stage - where they come in and are trying to determine - somebody filed a complaint - a letter saying that they don't think the representation I provided was adequate and/or was (inaudible) violative of the rule so they come and investigate. The AGC gets it, they send me a letter, and they say we think you're nuts Einhorn, and I say I don't think I am. Okay, now we have a material issue of material fact, now we want your - now we want your records and if you don't give us your

records we are gonna have a presumption that you are nuts. And that's what they want by 9.112(E).

CHIEF JUSTICE YOUNG: Anything else? You need to break it off.

MR. EINHORN: Yes, I want talk very -

CHIEF JUSTICE YOUNG: Nope, you're over time. I'll give you - you can make one concluding statement.

MR. EINHORN: Well, can I make one point? Okay. 9.104 in your - I saw a press release earlier - that says that it eliminates ground for discipline in the current version. We - there's no elimination of discipline in 9.104. All it does is it adopts the Rules of Professional Conduct and identifies in the AG - the Attorney Discipline Board had a letter they suggested one additional change to it - it would cover everything. So it would make the rules procedural, which is what it's supposed to do, and make the Rules of Professional Conduct do what it's supposed to do.

CHIEF JUSTICE YOUNG: Thank you.

MR. EINHORN: Any other questions? Thanks.

CHIEF JUSTICE YOUNG: We'll move on now to the next item for which are witnesses and it's Item 5 which is the proposed amendment of Rule 2.117 to clarify when a - an attorney may discontinue the attorney/client relationship. Speaking on that is, again, Ms. Bullington.

ITEM 5 - 2007-18 - MCR 2.117

MS. BULLINGTON: Just briefly, the Commission does not believe that the amendment to 2.117 is necessary. It would work a substantial harm to attorney/clients. We believe that to borrow a phrase used earlier it's better to trust but verify, and in this particular case it's better to verify by having an attorney either get out of the case by filing a substitution or by seeking court authority to remove himself or herself by filing a motion to withdraw. We do encounter situations where lawyers will simply walk away from a court - from a client, not file appropriate motions to withdraw. It's not a far stretch of the imagination to believe that the attorneys will then say well I mailed the letter to the client and, of course, then client will come back and say well, gee, I never got it. And when you

have that type of - 50/50 type of statements and you're trying to prove misconduct by an attorney abandoning a client in a disciplinary case that would not - we would not be able to meet our burden of proof by a preponderance. So overall so that courts can appropriately regulate their dockets and exercise their judicial function and for the protection of the public we do recommend against the adoption of the proposed changes.

CHIEF JUSTICE YOUNG: Thank you.

MS. BULLINGTON: Thank you.

CHIEF JUSTICE YOUNG: Mr. Bacon. You ought to just sit here.

MR. BACON: This actually is one of the rules that I was coming down specifically for. It's a rule that has come up over a long time in my practice of dealing with the lawyers in my law firm. I don't think that once the judges have put their opposition to having a withdrawal without their approval that there really should be any question that yes, the normal course there should be a court approval before final judgment. I haven't found that state court judges act unreasonably, perhaps differently than their federal counterparts, in allowing withdrawal under a reasonable basis. My focus here is that the rule does deserve, and maybe the way you have it with slight changes, to deal with situations after final judgment and maybe after the time for appeal has occurred. One example of that can be in family law matters where there are many times post-judgment matters that arise, whether it is parenting time, change - motions for changes in support, in which there never will be another final judgment. And those matters - discrete matters may very well end, and it's comparable to the final judgment situation and in those situations I don't think the rule necessarily addresses it for those post-final judgment matters. That I would think that you could use a rule either at the conclusion of a particular post-judgment matter that you don't have to have then later an order for the court. Because frequently later disputes do arise in those kinds of settings and the attorney who may have handled something in 2005 may not at all be around in 2010 with respect -

JUSTICE MARILYN KELLY: I think your point's well taken - I think your point's well taken, but I'm not immediately aware that it's been a problem.

MR. BACON: It has been a problem at times of not knowing whether your appearance has left - you know is still on record. Some judges will require -

JUSTICE MARILYN KELLY: Well, let me tell you -

MR. BACON: an additional order.

JUSTICE MARILYN KELLY: Let me tell you what specifically I mean. Do you recall instances where an attorney has been disciplined or he has been disciplined because of a controversy over whether the attorney continues to represent a client who's -

MR. BACON: I'm not aware of discipline - I am aware of -

CHIEF JUSTICE YOUNG: Suing.

MR. BACON: Pardon?

CHIEF JUSTICE YOUNG: Malpractice.

JUSTICE MARILYN KELLY: Are you aware of malpractice -

MR. BACON: Yeah. You can have a malpractice situation, you can have -

JUSTICE MARILYN KELLY: Are you aware - are you aware?

MR. BACON: I am aware of the uncertainties arising and in particular in family law matters, but it could also apply to simply post-judgment collection matters where an attorney might get involved in dealing with you know a particular garnishment that comes in and then you know it's not collected and then somebody wants to come around you know some time later and they serve that attorney again as though that attorney is still appearing on behalf of the client. And these are - and I'm talking post-final judgment matters, and that's where there can be - stand to be some clarification in here that says - and even if the clarification is that you must get an order allowing you to withdraw, at least people would know that they have to do that. But there are - there were a couple Court of Appeals cases going back to the 70s and then in the 90s that refer to each other, neither of - that mix up the issues but legitimately because they're looking for it in a malpractice case and in an appearance case - a matter of service on the lawyer. The 1973 case was *Ohlman v Ohlman*, 49 Mich App 366, that was not actually

an - that was a service issue I believe - service on attorney - and whether that attorney's appearance still existed. Later on cited in a malpractice case - *Miller v Kenney Cook and Linderfeld*, I don't think it was published, it was 1997 West Law 33352793 from 1997. So it does come up, and the concept is the lawyer is not - I think the one Court put it is it's no part of logic that because a court retains jurisdiction over the subject matter of litigation an attorney who has concluded his professional obligation in the proceedings and who has been paid, and often not, has the status of an attorney of record for the balance of his professional career. That really ought not to be done and that the rule ought to address the situation of the post-final judgment. There was one other comment -

CHIEF JUSTICE YOUNG: Why - why would we do that? What we're talking about in the context of representations before courts doesn't seem to me to be amenable to all of the myriad attorney/client relationships that - that occur after the proceeding has ended.

MR. BACON: Well, this is still in court I'm talking. You may enter an appearance for a particular dispute - post-final judgment dispute and that dispute has ended, but does that mean your appearance applies to all later post-judgment disputes in that matter. And generally speaking I think most of the attorneys would think not, most judges would - would agree with that, but some judges want an order and usually in these matters there may be difficulty getting ahold of clients and partly for purposes of service whether service on that attorney really is getting notice to a client to clarify. There was a - some objection to the proposed language in here -

CHIEF JUSTICE YOUNG: You may conclude.

MR. BACON: dealing with the intermixture of this with like statutes of limitations and malpractice - you could cure that pretty easily by using the words instead of talking attorney/client relationship that the length that the - that such materials do not you know extend an appearance or renew an appearance previously withdrawn.

CHIEF JUSTICE YOUNG: Thank you. All right. Item 5 - proposed amendment of 2.11 - No, I'm sorry we just did that. Yeah, it's Item 7 now. You're here again. And Item 7 concerns 2.507 - whether to clarify agreements the - what is appropriate to settle a case and the formality thereof.

ITEM 7 - 2008-11 - MCR 2.507

MR. BACON: I guess that's me again. That is -

CHIEF JUSTICE YOUNG: Tell me - you're it from here on out.

MR. BACON: Okay. 2.507(G) is the rule. The proposal was to delete the language subsequently denied by either party. If that language has no meaning at all, then, yes, delete it. And there are some courts that have reach the analysis that makes that very similar to having no meaning. I think it does have some value here just the same kind of value that making a statute of frauds an affirmative defense that has to be pled. Having this where the person has to subsequently deny it has that same value. If there is no denial of that agreement, then it ought not to be for a court to refuse to enforce it if both sides had - had not denied it. But I would take that one step further and say that even the subsequent denial ought to - and maybe you ought to expand it if it's necessary because there's been some confusion in courts, that the subsequent denial ought to be on a basis other than failure to comply with Rule 2.507(G). So that what you are doing is saying - what you're prohibiting is someone entering into the agreement and simply saying yeah, I did it, but I change my mind. That if there's an - if there's a defense that says I don't think the agreement was enforceable as a meeting of the minds or there's some other objection to the form of the agreement, that subsequent denial is sufficient to say no, we got to have it in writing, we aren't gonna have a testimonial hearing here about an agreement whether it exists. I think the State Bar has had a proposal that you extend this to agreements in depositions. In general, I don't think that that is - other than if you wanted to limit it to procedural stipulations with respect to that deposition that shouldn't be extended, or you extend it to any recorded agreement whether it be in deposition or not. I do have - I do want to point out that the business of subsequent denial does have some support in other statutes of limitations - the UCC statute of limitations, for instance, does enforce agreements to the extent it netted otherwise. You obviously get to decide this issue overall. But as long as you're looking at 2.507(G), there's another change that you should consider. There is the use of the word subscribed in this rule. I would suggest that that be changed to signed. About five years ago the Court of Appeals looked at the rule, looked at the origin of the rule - of the word subscribed, and legitimately determined that that means the signing has to be at the bottom of the agreement. I think that's not the way courts generally looked at this rule,

and certainly when they characterize the rule over the years you'll see many opinions referring to it as being an agreement that is signed even though the rule itself says subscribed. Those are synonyms in most dictionaries, but they're - legitimately the Court of Appeals could reach that, but I don't think that that is necessarily a good rule for you to have particularly in today's technology when there are things sent electronically and it is truly fortuitous whether the name of the person who's sending a message appears at the top or might be at the bottom of a message and it would clear that up. I think that's - that's it.

CHIEF JUSTICE YOUNG: Well, hang on, we're going to Item 8, the last one, and it pertains to amendments - proposed amendments of Rule 2.203, whether the courts should clarify that a summons must be issued for any newly added parties in a cross or counterclaim.

ITEM 8 - 2008-32 - MCR 2.203

MR. BACON: The only reason I have any comments on this rule at all is because of the State Bar's comments which are just wrong. The State Bar submitted comments saying that there is no provision for adding parties to counterclaims or cross-claims other than the third-party rule - third-party defendant rule, and 2.207 clearly recognizes the addition of cross - parties by reason of cross-claims and counterclaims and that's been in the rule back into the general court rules. It has - what you might want to do is have a provision that says something along the lines of the addition of parties is governed by 2.206 and 2.207. 2.207 is the one specifically giving courts the right to add and then saying you can add for parties - and other parties are needed for complete relief. 2.206 is probably generally understood to permit addition for cross-claims and counterclaims although it is not as explicit. The federal - comparable federal rule has that kind of specific statement in the counterclaim rule where it says you know the rule governing addition of parties is such and such. The language about adding - you know setting the summons and the time period of the summons are good additions. I think they probably arose directly from a comment in an ICLE treatise on the rule that recognized the absence of that kind of provision can cause some difficulties where a court clerk may refuse to issue a summons or if it issues a summons the summons ends up being for 91-days rather than the similar 21-days that's allowed for third-party complaints. And I think those are good changes.

CHIEF JUSTICE YOUNG: Thank you. There being no other speakers to the matters on the public agenda, we are adjourned. Thank you very much.